IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NTP, INC.,	)
	)
Plaintiff,	)
	)
v.	) **Civil Action No. 3:07cv549JRS**
	)
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,	)
	)
	)
Defendant.	)
	)

REPLY MEMORANDUM
IN SUPPORT OF VERIZON WIRELESS' MOTION TO STAY

Defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"), by counsel, states the following in further support of its motion to stay this action pending the conclusion of all proceedings, including appeals, arising out of the United States Patent and Trademark Office's ("PTO") reexamination of the patents asserted against Verizon Wireless by Plaintiff NTP, Inc. ("NTP").

INTRODUCTION

This Court correctly and unconditionally stayed the *Palm* case "until the validity of the patents-in-suit is resolved by the Patent & Trademark Office and through any consequent appeals." *NTP, Inc. v. Palm, Inc.*, Civ. Action No. 3:06CV836, slip. op. at 1 (E.D.Va. March 22, 2007) (Spencer, J.) (attached as Ex. 1 to Verizon Wireless' Opening Brief). In an effort to conserve judicial and party resources, Verizon Wireless requested that this case be stayed on exactly the same terms – nothing more, nothing less. While NTP agrees in principle that a stay should be entered, it proposes a stay that differs substantially from the one entered in *Palm*. There is no sound basis for treating similarly situated parties differently and no reason for the

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Court to have to monitor different stays. The reexamination proceedings have progressed even further than they had when *Palm* was stayed, and there is no reason why the stay in this later-filed case should differ from the terms imposed in *Palm*. Verizon Wireless respectfully requests that its proposed stay, attached as Exhibit A, be entered.

ARGUMENT

I. THE STAY SHOULD BE GRANTED PENDING FINAL RESOLUTION OF THE REEXAMINATION OF THE PATENTS IN SUIT, WITHOUT FURTHER CONDITION.

A. NTP Seeks To Deprive Verizon Wireless Of Substantive Rights.

Verizon Wireless proposes that the Court's stay mirror the language entered in *Palm* – but NTP wants more. NTP seeks to impose a new condition that would make Verizon Wireless bound by the reexamination proceedings.

No such condition was imposed on Palm, and there is no legal or equitable reason why Verizon Wireless should be placed in a different and more prejudicial position. Indeed, to prohibit Verizon Wireless from litigating its invalidity positions, even if those positions were rejected by the PTO, would deprive Verizon Wireless of its right to a jury trial in contravention of the Seventh Amendment.

Moreover, there is no law, and NTP cites none, whereby defendants in patent cases can be bound by adverse invalidity findings in *ex parte* reexamination proceedings. The Patent Act does prohibit a third-party requestor from raising invalidity contentions that it raised in an *inter partes* reexamination proceeding, 35 U.S.C. § 315(c), but of course, only one of the reexamination proceedings in this case is *inter partes*, and Verizon Wireless was not a requestor in the *inter partes* reexamination proceedings. Moreover, the Patent Act specifically permits defendants to challenge invalidity in District Courts, 35 U.S.C. § 282, regardless of any decision made by the PTO.

NTP claims that it would be "fair" to so bind Verizon Wireless, because NTP itself will be bound by any decision invalidating the patents. But this twisted notion of "fairness" ignores that NTP has actively participated in the reexamination proceedings, but Verizon Wireless has not.[1] Indeed, what NTP is proposing is akin to offensive, non-mutual collateral estoppel, something that cannot be allowed where the party to be bound could not have joined in the previous case. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979).

To impose such a condition would be an improper and unwarranted variation from the stay entered in *Palm.*

B. NTP Attempts To Slip A Condition Into Its Proposed Order That It Fails To Address In Its Memorandum.

NTP's Proposed Order would force Verizon Wireless to file its Answer and any responsive pleadings despite the entry of the stay. Notably, NTP does not address or support this proposal in its response memorandum. Verizon Wireless should not be required to file an Answer or responsive pleading, for the same reasons that a stay should be entered. Given the status of the reexamination proceedings, it is unclear what, if any, claims will survive. Even if some claims manage to survive, they may be modified. It would be a complete waste of Verizon Wireless's resources and money to have to prepare a response or Answer to claims and patents that are clearly, at best, in flux.

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[1] NTP's citations to two cases from the Eastern District of Texas are inapposite. In both cases, a defendant had requested the reexamination, and thus submitted to the PTO what the defendant believed was invalidating prior art. In this case, Verizon Wireless did not request the reexaminations nor submit prior art or arguments to the PTO. Verizon Wireless cannot be bound by other parties' prior art positions.

CONCLUSION

For the foregoing reasons, Verizon Wireless respectfully requests that the Court enter the Order attached as Exhibit A and grant its motion to stay this litigation pending resolution of the patent reexamination proceedings, including all appeals therefrom.

Dated: September 24, 2007

Respectfully submitted,

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS

By Counsel
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CERTIFICATE OF SERVICE

I certify that on September 24, 2007, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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I certify that I will mail the document by first class mail to the following non-filing users:

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NTP, INC.,	)	
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Plaintiff,	)	
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CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,	)	
	)	
Defendant.	)	

STAY ORDER

Plaintiff NTP, Inc. ("NTP") has filed an action for patent infringement in the Eastern District of Virginia under Civil Action No. 3:07cv549 (JRS) (the "Action"). Defendant Cellco Partnership d/b/a Verizon Wireless ("Cellco") has moved for a stay of the proceedings based on the reexamination of U.S. Patent Nos. 5,436,960, 5,438,611, 5,625,670, 5,819,172, 6,067,451, 6,317,592, 5,479,472 and 5,631,946 (the "Reexamination Proceedings"). Based upon this Court's review of the briefs and exhibits submitted by the parties, it is hereby ORDERED that:

1. The Action shall be stayed until the validity of the patents-in-suit is resolved by the Patent & Trademark Office and through any consequent appeals;

2. NTP shall provide a status report on the progress of the Reexamination Proceedings on April 1, 2008, and shall provide further status reports on a six-month basis or as circumstances require; and

3. The parties agree to institute litigation holds and preserve evidence with respect to the issues raised in the Complaint.

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The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

Dated: ________________

____
Chief United States District Judge

We ask for this:

By: ___/s/___________________________
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